90-1920 (1)

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

MARVIN DIERSCHKE AND JANIS DIERSCHKE,

Petitioners,

v.

WALTER O'CHESKEY, TRUSTEE, *et al.*,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DANA EHRLICH
SMITH, CARTER, ROSE,
FINLEY & HOFMANN
A Professional Corporation
P. O. Box 2540
San Angelo, Texas 76902-2540
915/653-6721
FAX No. 915/653-9580
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Section 522 (c) of the Bankruptcy Code of 1978 prohibits the Bankruptcy Court from requiring debtors to sell or grant real property in the form of an easement, exempt under state homestead laws, to third parties for the benefit of unsecured creditors after the debtor's exemptions have been allowed under §522(1) of the Bankruptcy Code.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are Marvin A. and Janis L. Dierschke. Respondents are (although not all have participated in this appeal):

1. Walter O'Cheskey, Standing Chapter 12 Trustee
2. Stotler & Co.
3. Tom L. Tippens
4. Central National Bank of San Angelo, Texas
5. Brian Dierschke
6. David Lange
7. Central National Branch of the First National Bank of Lubbock, Texas.

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No. _____

In The

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October Term, 1990

MARVIN DIERSCHKE AND JANIS DIERSCHKE,

Petitioners,

v.

WALTER O'CHESKEY, TRUSTEE, *et al.*,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Marvin A. and Janis L. Dierschke respectfully request this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 18, 1991.

OPINIONS BELOW

The Order of the Bankruptcy Court (App. 1a) is not reported. The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas (San Angelo Division), WOODWARD, J., is not

reported. (App. 6a) The Per Curiam Opinion and Order Denying Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit are unreported. (App. 20a-23a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered February 19, 1991. (App. 20a). Petitioners' timely Petition for Rehearing was denied March 18, 1991. (App. 22a). This petition is being filed within 90 days after entry of the order of the Court of Appeals denying the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 522(1) of the Bankruptcy Code states:

> "The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt."

11 U.S.C.A. §522(1) (1991).

Section 522(c) of the Bankruptcy Code states:

> "Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under Section 502 of

this title as if such debt had arisen, before the commencement of the case. . . . "

11 U.S.C.A. §522(c) (1991).

Article 16, §50 of the Texas Constitution provides:

"The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of the purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon. . . . " Tex. Const. art. 16, §50.

Texas Property Code §41.001 (a) (Vernon Supp. 1991):

"A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on the property."

Texas Property Code §41.002 (b) (Vernon Supp. 1991):

"If used for the purposes of a rural home, the homestead shall consist of:

(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon. . . . "

STATEMENT

The fundamental issue in this case is whether Bankruptcy Courts have the power to order bankruptcy debtors to sell and convey exempt property – real property in the form of easements – for the benefit of unsecured creditors.

The United States Bankruptcy Court for the Northern District of Texas, San Angelo Division, had jurisdiction of this core proceeding for the sale of estate assets pursuant to 28 U.S.C. §157. The United States Court of Appeals for the Fifth Circuit exercised appellate jurisdiction pursuant to 28 U.S.C. §1291.

The Petitioners ("Dierschkes") are Texas cotton farmers who sought and successfully received relief through confirmation of a reorganization plan under Chapter 12 of the Bankruptcy Code on November 2, 1990. The plan provided that the Dierschkes would sell all of their unencumbered non-exempt real property and distribute the proceeds to their unsecured creditors.

The Standing Chapter 12 Trustee, Walter O'Cheskey, sold the unencumbered, non-exempt real property to David Lange. Prior to the sale, O'Cheskey requested that the Bankruptcy Court order the Petitioners to give a road easement across the homestead farmlands of the debtors in favor of Lange, the buyer of the unencumbered farmland. The Bankruptcy Court ordered that Petitioners convey the road easement to Lange, across their exempt farmland (App. 1a and App. 24a).

It is undisputed that the easement crosses and is part of the exempt homestead lands of the Petitioners (App. 19a). The Petitioners properly claimed 200 acres of land for their family as homestead under Bankruptcy Code §522(b), electing exemptions under Texas law on their Bankruptcy schedules. (App. 30a-35a). No objections by any creditor were made and the exemptions were therefore allowed.

The Petitioners believe that the Bankruptcy Court's order that they sell and convey an easement to the buyer of the unencumbered real property amounts to a forced sale of a portion of their exempt homestead property in violation of §522 (c) of the Bankruptcy Code, Texas Const. art. 16, §50, and Texas Property Code §41.001 et seq.

THE REASONS FOR GRANTING THE WRIT

The following are special and important reasons for granting the writ:

1. The Bankruptcy Court decided a significant, novel issue involving the debtors' statutory right to exemptions.

The determination of property rights in the assets of a bankrupt's estate is governed by state law. *Butner v. United States*, 440 U.S. 48, 59 L.Ed.2d 136, 99 S.Ct. 914, (1979). The federal bankruptcy court should take whatever steps are necessary to ensure that pre-bankruptcy property rights are given the same protection in bankruptcy court as if no bankruptcy ensued. *Butner, Id.* 440 U.S. 48 at 56.

Like any other debtor in bankruptcy who elects exemptions under state law, the Petitioners are entitled to protection under the state exemption laws in Bankruptcy Court. *In re McConchie*, 94 B.R. 245 (Bankr. D. Mass. 1988). No part of Petitioners' exempt property, including the easement across their homestead, may be sold for the benefit of unsecured creditors. By selling the easement across their exempt farmland to a third party for the benefit of unsecured creditors, the Bankruptcy Court has

sold Petitioners' exempt property in violation of §522 (c) of the Bankruptcy Code.

Because the issue is important in the administration of the Bankruptcy laws, Petitioners believe the writ should be granted, and after a full hearing, the decision of the Court of Appeals reversed and rendered. *Reading Co. v. Brown*, 391 U.S. 471, 20 L.Ed. 2d 751, 88 S. Ct. 1759 (1968).

2. The Bankruptcy Court was without jurisdiction to order a sale of exempt homestead property.

With the enactment of the Bankruptcy Act of 1978, 11 U.S.C. §101 *et seq.* (1976 ed, Supp V) [11 USCS §§101 et seq.], Congress in effect overruled the holding of *Lockwood v. Exchange Bank*, 190 U.S. 294, 23 S.Ct. 751, 47 L.Ed. 1061 (1903). The *Lockwood* court held that the Bankruptcy Court had no subject matter jurisdiction to administer exempt property, reasoning that legal title remained in the debtor and did not pass to the trustee.

The 1978 Act abolished such title distinctions and it is clear that exempt property now becomes a part of the bankruptcy estate to be administered by the trustee until the debtors' exemptions are allowed. *In re Donaghy*, 11 B.R. 677 (Bankr. S.D. N.Y. 1981). *In re Scrimpsher*, 17 B.R. 999 (Bankr. N.D. N.Y. 1982). Once so allowed, Section 522(c) bars the sale of exempt property for the pre-petition debts of the debtor.

Section 522(c) of the Bankruptcy Code states:

> "Unless the case is dismissed, property exempted under this section is not liable during

> or after the case for any debt of the debtor that arose, or that is determined under Section 502 of this title as if such debt had arisen, before the commencement of the case,. . . . "
>
> 11 U.S.C.A. §522(c) (1991).

Petitioners claimed 200 acres of homestead property as exempt property under art. 16, §50 of the Texas Constitution. Petitioners listed the Tracts as Eight (8) and Nine (9) on Schedule "B-1" in debtors' bankruptcy schedules, and claimed as homestead on Schedules "B-1" and "B-4" of the Bankruptcy Schedules. (App. 31a-35a). The exemptions were designed to permit debtors to retain exempt property so that they will be able to enjoy a "fresh start" after bankruptcy. *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982)

No creditor objected to the Petitioners' claim of exemption between the conclusion of the §341 meeting of creditors and the 30 day period thereafter. Therefore, the 200 acres of farmland became the debtors' exempt property under the Texas Constitution and Bankruptcy Code §522(c).

Section 522(c) prohibited the Bankruptcy Court from selling any part of the exempt property for the benefit of unsecured creditors. The Dierschkes have an absolute right to an exemption of 200 acres of homestead property and neither O'Cheskey nor the Bankruptcy Court has the power to order the homestead be conveyed to strangers who purchase the debtors' non-exempt real property. Tex. Const. art. 16, §50 (1978).

Lack of subject matter jurisdiction may be raised at any time by a party or by the court *sua sponte*. *Huddleston v. Nelson Bunker Hunt Trust Estate*, 109 B.R. 197 (N.D. Tex. 1989). An appellate court is under a duty, moreover, to ensure that the lower court has not exceeded its jurisdiction. *Sumner v. Mata*, 449 U.S. 539, 547 n.2, 101 S. Ct. 764, 769 n.2, 66 L.Ed. 2d 722 (1981). Absence of subject matter jurisdiction may render a judgment void where a court extends its jurisdiction beyond the scope of its authority. *Huddleston, supra* at 201.

3. The Order of the Bankruptcy Court – ordering the easement across the debtors' exempt homestead property – violated the Fifth Amendment "Takings" Clause.

Bankruptcy proceedings are subject to Fifth Amendment's Takings Clause. *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982). Private property shall not be taken even for a wholly public use without just compensation. *Id.* Moreover, the "takings" analysis of the court is not limited to outright acquisitions by the government itself. *Id.*

In Texas, the homestead exemption is a unique right. The homestead right is not a mere statutory entitlement, but a vested property right. *Williams v. Williams*, 569 S.W. 2d 867 (Tex. 1978). Likewise, Section 41.001 *et seq.* of the Texas Property Code plainly exempts the homestead from seizure of the claims of creditors. No older nor more well established law exists in Texas other than the constitutional protection from the forced sale of a homestead. *Mallou v. Payne & Vendig*, 750 S.W. 2d 251 (Tex. App. –

Dallas 1988, writ denied). Equally compelling is that protection of the homestead is a fundamental policy of Texas law. *Commonwealth National Bank v. United States*, 573 F. Supp. 881 (N.D. Tex. 1983).

The Court of Appeals stated in its opinion that since an "easement entails only a use of the servient estate and not a conveyance of the estate itself, the district court properly ruled that no forced sale occurred to violate the protections afforded by Texas' homestead law." (App. 20a).

For purposes of Fifth Amendment analysis, the homestead consists of a "bundle of rights." *United States v. Security Industrial Bank, supra*, 459 U.S. at 76. The easement right is obviously smaller than those rights accruing to the owners, the Petitioners. Nevertheless, the right is still "property" for purposes of the Fifth Amendment. *Id.*

One of the most important in the "bundle of rights" is the right of possession. *Villareal v. Laredo National Bank*, 677 S.W. 2d 600 (Tex. App., San Antonio, 1984, writ ref'd n.r.e.). The Bankruptcy Court's order placed a third party in possession of Petitioners' homestead, in direct conflict with the Petitioners' right of possession. It matters not whether the sale of the homestead is of the fee simple estate itself or "only a use" of the fee simple estate, because in either case, the Petitioners have lost the use of the property for the support of the family. Since Petitioners have no right to plant crops for the support of their family on the easement, their 200 acre homestead exemption has been significantly impaired.

The Bankruptcy Court's action has deprived Petitioners of their vested property right in their homestead

without just compensation in contravention of the Takings Clause of the Fifth Amendment.

4. The Court of Appeals has decided this issue in conflict with the Texas Constitution, the laws of Texas and its decisions.

Petitioners believe that the Court of Appeals has decided an important question of federal law which has not been decided by this Court: Whether Bankruptcy Courts have the power to force a sale of §522 exempt real property in the form of an easement. Moreover, Petitioners believe that the Court of Appeals has decided this question in a way that conflicts with the Constitution and statutes of Texas and the applicable precedents of the Texas Supreme Court.

The Texas Supreme Court has consistently voided attempts of creditors to evade the Texas Constitution and to subject the homestead to claims of creditors. *Anglin v. Cisco Mortgage Loan Co.*, 141 S.W. 2d 935 (1940). *Rutland Savings Bank v. Isbell*, 137 Tex. 432, 154 S.W. 2d 442, 445 (1941). Likewise, the Fifth Circuit has recognized and protected the homestead from creditors' claims. *Truman v. Deason (In re: Niland)*, 825 F.2d 801 (5th Cir. 1987).

The purpose of the rural homestead exemptions is to protect the family and to allow the Petitioners to have a place to live and work free from the claims of creditors. The Bankruptcy Code's policy of giving the Petitioners a "fresh start" has been undermined by allowing the sale of their exempt real property.

CONCLUSION

This court should accept this case to underscore the principle that all debtors under the Bankruptcy Code are entitled to a "fresh start" under the Bankruptcy Code. The Petitioners' exemptions should not be impaired by the sale of an interest therein for the benefit of unsecured creditors of the Petitioners. However slight the interest in the easement may be characterized, the integrity of the homestead under the Texas and Federal Constitution should be maintained.

For the foregoing reasons, a Writ of Certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DANA EHRLICH
SMITH, CARTER, ROSE,
FINLEY & HOFMANN
A Professional Corporation
P. O. Box 2540
San Angelo, Texas 76902-2540
915/653-6721
FAX No. 915/653-9580

Attorneys for Petitioners

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

In re:	)	
	)	Case No.
MARVIN A. DIERSCHKE AND	)	689-60047-12
JANIS L. DIERSCHKE	)	
	)	
Debtors	)	

ORDER GRANTING TRUSTEE'S MOTION TO COMPEL DEBTORS TO GRANT AN EASEMENT BY NECESSITY

Came on to be considered the Trustee's Motion to Sell Property Free and Clear of Liens and Motion to Grant an Easement by Necessity (the "Motion") filed by Walter O'Cheskey, Standing Chapter 12 Trustee in the above styled and referenced bankruptcy case of Marvin A. and Janis L. Dierschke (the "Debtors"). Upon consideration of the Motion, the Chapter 12 Plan of Reorganization confirmed in this case and the arguments of counsel/ (sic) the Court finds as follows:

1. On March 7, 1989, the Debtors filed their voluntary petition for relief under Chapter 12 of the Bankruptcy Code.

2. On November 2, 1989, the Debtors obtained confirmation of their Plan of Reorganization (the "Plan").

3. The Plan provided that the Trustee was empowered to sell certain nonexempt property of the Debtors, including certain realty described in Exhibit "A" and incorporated herein by reference (the "Property"), for the benefit of the creditors of the estate.

4. The Plan further provided that Brian Dierschke, the son of the Debtors, had an exclusive right to purchase

the Property on or before February 3, 1990 for no less than $218,500. After February 3, 1990, Brian Dierschke had a nonexclusive right to purchase the Property, which right gave him the opportunity to make an offer on the Property in a manner equal to any other prospective purchaser of the Property.

5. The Property which the Trustee proposes to sell pursuant to the Motion is contigious (sic) to tracts of real property owned by the Debtors.

6. Once severed from the real property presently owned by the Debtors, the Property is landlocked and without access to any dedicated or platted roads.

7. The easement requested to be granted in the Motion is necessary to gain ingress and egress to the Property.

8. The sale of the Property is authorized by and made pursuant to the terms of the Plan.

9. The Debtors' obligations to facilitate and perform the terms of their Plan include their cooperation in assisting the Trustee to sell the Property and pay their creditors under the terms of the Plan.

10. No burden will result to the estate or to the Debtors from their granting the necessary easement to the Property.

11. Based on the foregoing, cause exists to grant the relief requested in the Trustee's Motion to cause the Debtors to grant an easement to the Property.

Accordingly, it is

ORDERED that the Trustee's Motion, to the extent that it requests that the Debtors grant an easement to the Property, is granted; and it is further

ORDERED that the Debtors grant to the purchaser of the Property "a thirty foot easement for the purpose of ingress and egress by the purchaser, his heirs and assigns, tenants and invitees, in any way or manner, to and from the property described as TRACT TWO in Exhibit "A" to that certain paved road running along the western boundary of Section 50 of District 11 and running along the southern boundary of land presently owned by Marvin Dierschke, and being adjacent to the southern boundary line of said survey" (the "Easement"); and it is further

ORDERED that the Easement be and hereby is granted.

DATED this 1st day of March, 1990.

/S/ John C. Akard
Hon. John C. Akard
U.S. Bankruptcy Judge

EXHIBIT "A"

Attached to and made a part of that certain contract of sale by and between the Chapter 12 Standing Trustee, as Seller, and David Lange, as Buyer, dated February 7, 1990.

TRACT ONE:

126.7052 acres of land out of and a part of Washington County RR. Survey No. 157, Certificate No. 28/16,

Abstract No. 1053, consisting of 13.3329 acres of land in Concho County and 112.7423 acres of land in Tom Green County, Texas. Said 126.7052 acres of land is more particularly described by metes and bounds as follows:

BEGINNING at a point in the centerline of a county road for the northeast corner of this tract from which point of beginning the northeast corner of said Survey No. 157 bears N 0° 17' 00" W 1409.94 feet;

THENCE S 0° 17' 00" E 2236.10 feet along the centerline of said county road to a point for the southeast corner of this tract;

THENCE S 89° 00' 07" W at 20.07 feet pass a 3/4" iron pipe set in the west line of said county road continuing in all 5354.46 feet to a 3/4" iron pipe set by an old fence post for the southwest corner of this tract;

THENCE N 0° 45' 12" W 436.11 feet to a 3/4" iron pipe set for the most westerly northwest corner of this tract;

THENCE N 89° 02' 09" E 3697.55 feet to an iron "T" post found for a corner of this tract;

THENCE N 0° 34' 50" W 1930.12 feet to a 3/4" iron pipe found for the most northerly northwest corner of this tract;

THENCE N 89° 56' 30" E past a 3/4" iron pipe found at 1649.79 feet to the place of beginning.

TRACT TWO:

The East 145.4475 acres of the South 200 acres of land out of Survey No. 50, Abstract No. 8258, District No. 11, Southern Pacific Railroad Company, Tom Green County, Texas, which South 200 acres are described in two tracts by metes and bounds as follows:

FIRST TRACT: 160 acres, BEGINNING at the Southwest corner of said Survey:

THENCE East 1913 varas with the South boundary line of same to the Southeast corner of said Section;

THENCE North with the East boundary line 475 varas;

THENCE West parallel to the South boundary line 1913 varas to the west boundary line of said Survey;

THENCE South with the West boundary line of said survey 475 varas to the place of BEGINNING, containing 160 acres of land off the South side of said Survey.

SECOND TRACT: 40 acres, lying immediately North of the above described First Tract, described by metes and bounds as follows:

BEGINNING 475 varas North of the Southwest corner of said Survey, which beginning point is the Northwest corner of the above 160 acre tract for the beginning of this tract;

THENCE East 1913 varas to the Southeast corner of this tract;

THENCE North with the East boundary line of Survey No. 50, 110 yards to the Northeast corner of this tract;

THENCE West parallel with the South boundary line of 1913 varas to the West boundary line of Survey No. 50;

THENCE South 110 yards to the place of BEGINNING, containing 40 acres of land.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

MARVIN A. DIERSCHKE and JANIS L. DIERSCHKE, Debtors/Appellants	* * * * *	CIVIL ACTION NO. CA6-90-0027-W [Bankruptcy Case No. 689-60047-12]
BRIAN DIERSCHKE, Appellant	* *	

MEMORANDUM OPINION AND ORDER

On this date the Court considered the appeals of Marvin A. Dierschke, Janis L. Dierschke, and Brian Dierschke, appealing two Orders entered by the Bankruptcy Court on March 1, 1990, i.e. Order Granting Trustee's Motion to Compel Debtors to Grant an Easement by Necessity, and Order Granting Trustee's Motion to Sell Property Free and Clear of Liens.

After considering the Briefs of Appellants, Marvin A. Dierschke and Janis L. Dierschke, Appellant, Brian Dierschke, and Appellees, Walter O'Cheskey, the Chapter 12 Trustee, and Stotler & Company, a creditor, the Court is of the opinion and finds as follows:

The Court finds that it has jurisdiction over this appeal pursuant to 28 U.S.C. Section 158(a).

NATURE OF THE CASE

Morris (sic) Dierschke and Janis Dierschke, Debtors, proposed a consensual plan of reorganization under Chapter 12 of the Bankruptcy Code. The plan was confirmed by the Bankruptcy Court on November 2, 1989.

The plan provided that Debtors would sell certain portions of their non-exempt real property, with the proceeds to be distributed to unsecured creditors. The plan further provided that the Debtors' son, Brian Dierschke, would have an exclusive right to purchase the property before February 3, 1990, and that if Brian Dierschke did not exercise this right before such date, the Trustee could sell the property to another, with Brian having a nonexclusive right to purchase after February 3, 1990.

Brian Dierschke did not exercise his exclusive right to purchase before February 3, 1990, and the Trustee entered into contract with David Lange.

DISPOSITION IN THE COURT BELOW

The Trustee filed a motion to sell a 145.4475 acre tract of non-exempt real property to David Lange and also filed a motion to obtain an order directing that the Debtors grant to Lange an easement by necessity across other lands of the Debtors (i.e. their homestead).

After the Trustee filed his motion, the Debtors filed a motion to sell the property to their son, Brian Dierschke, allegedly for the same price that Lange had offered.

After an evidentiary hearing, the Bankruptcy Court granted the Trustee's motion to sell the property to Lange and also ordered that the Debtors grant an easement by necessity across their land to Lange. Further, the Bankruptcy Court denied the Debtors' motion to sell the property to their son, and found that Brian Dierschke did not have a right of first refusal since he had not offered to purchase the property prior to the February 3, 1990,

deadline. The Court further found that Brian's offer to purchase did not match the offer tendered by Lange; so therefore, no additional benefit to the Debtors' estate would have been realized if the property had been sold to Brian. The Bankruptcy Court's Orders were dated March 1, 1990.

On March 2, 1990, the Chapter 12 Trustee sold the property to David Lange for $272,152.70 by a general warranty deed, which expressly granted an easement across the Debtors' homestead property.

Debtors and their son, Brian Dierschke, filed a Motion for Stay of Order Pending Appeal, Motion for Leave to Appeal, and Notice of Appeal on March 5, 1990. This Court entered an Order Granting Leave to Appeal on March 21, 1990. The Bankruptcy Court denied the Motion for Stay on April 11, 1990, finding that the Trustee was authorized to close the sale under Bankruptcy Code Section 363(m), notwithstanding the appeal, and ordered that the proceeds be promptly distributed to the creditors/lienholders. No appeal was taken from the Order denying the stay pending appeal.

ISSUE ON APPEAL

There are two issues on appeal before this Court:

(1) Brian Dierschke argues that the Bankruptcy Court erred in refusing to consider his offer of sale and in not accepting his non-exclusive right to match the offer of David Lange on such proposed sale.

(2) Debtors, Marvin A. Dierschke and Janis L. Dierschke, argue that the Bankruptcy Court

erred in requiring them to grant an easement by necessity across their homestead.

BRIAN DIERSCHKE'S APPEAL

The first issue facing the Court is whether or not Brian Dierschke's appeal regarding his alleged right to purchase the property is moot.

11 U.S.C. 363(m) provides that:

> The removal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of the sale or lease under such authorization to an entity that purchased the property in good faith, whether or not such entity knew of the pendency of appeal, *unless such authorization and such sale was stayed pending appeal.* [emphasis added]

Sections (b) and (c) give the Trustee authority to sell property of the estate, one section requiring notice and the other without notice. The authority of the Trustee is not in question in this appeal.

The rationale behind 363(m) is to afford finality to decisions of the Bankruptcy Court so that a purchaser of land under Section 363 may reasonably rely on the court order without fear of future litigation over the rights in the property. *International Union United Auto, etc. and Local 982 v. Morse Tool,* 85 B.R. 666 (D.C. Mass. 1988).

One of the requirements of 363(m) is that there must be a good faith purchaser. Knowledge of claims asserted in a pending appeal is not a breach of the good faith requirement. *Miami Center Ltd. Partnership v. Bank of New York,* 838 F.2d 1547 (11th Cir. 1988). "The 'good faith purchaser' is one who buys in good faith, that is, free of

any fraud or misconduct and for value and without knowledge of any adverse claim." *Miami Center Ltd. Partnership* at 1554. There was no showing of fraud or misconduct on the part of Lange; and he acknowledged that he knew that his right to purchase was dependent on the Court allowing his purchase. The plan giving Brian Dierschke the non-exclusive right to purchase after February 3, 1990, was not worded so as to give Brian a right of first refusal. He was just given a non-exclusive right to purchase, and the Bankruptcy Court found that his offer did not match Lange's offer, nor was it higher.

In *Matter of Andy Frain Services, Inc.*, 798 F.2d 1113 (7th Cir. 1986), the Court said that it must look to the record to determine if the buyer qualified as a good faith purchaser. After finding on the facts before it, the Seventh Circuit found that the purchaser was a good faith purchaser and then found that "the sale of the assets of AFS to Blair is a moot issue because Wilson failed to comply with 1 U.S.C. Section 363(m)."

The Eleventh Circuit, in *In Re the Charter Co.*, 829 F.2d 1054, 1056 (11th Cir. 1987), found that:

> In order to protect those who purchase property from a bankruptcy estate, the Bankruptcy Code provides that once a sale is approved by the bankruptcy court and consummated by the parties, the bankruptcy court's authorization of the sale cannot be effectively altered on appeal. . . .
>
> Because this provision [363(m)] prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot. [citing *In re Bleaufontaine*, 634 F.2d 1383, 1389-90 (5th Cir. Unit B

1981); *In re Vetter Corp.*, 724 F.2d 52, 55-56 (7th Cir. 1983)].

The Ninth Circuit in *In Re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172-1173 (9th Cir. 1988) discussed the policy behind section 363(m) and stated that:

> An absolute mootness rule would complement the absolute language of section 363(m). Such a rule would reinforce Bankruptcy Rule 8005, which establishes a procedure for stays in all appeals. The rule would avoid creating an incentive for the purchaser to take irreversible steps, and the rule would protect the interests of a bona fide purchaser against the fortuity that the purchaser is made party to the appeal.
>
> Finality in bankruptcy has become the dominant rationale for our decisions; the trend is towards an absolute rule that requires appellants to obtain a stay before appealing a sale of assets. In the meantime, however, our past reliance on the rationale of a court's inability to fashion relief leaves an exception to bankruptcy's mootness rule. Since we first allowed this exception, for cases in which a court is able to fashion relief, the exception has operated in only one situation: "where real property is sold to a creditor who is a party to the appeal." *In re Sun Valley*, 823 F.2d at 1373 . . . In *In re Sun Valley* we noted that this exception for real property sold to a party-creditor is especially appropriate "where the foreclosure sale is subject to statutory rights of redemption." (sic)
>
> . . .
>
> Other circuits have not permitted a mootness exception under these circumstances.

There has been no allegation or showing that the property was sold to a creditor. The Court therefore finds

that Brian Dierschke's appeal of the Bankruptcy Court's "Order Granting Trustee's Motion to Sell Property Free and Clear of Liens" should be **dismissed as moot for his failure to obtain a stay pending appeal.**

It is therefore **ORDERED** that Brian Dierschke's appeal is hereby **dismissed as moot.**

DEBTORS' APPEAL

The Debtors are farmers who live near Wall, Texas. In implementing their confirmed Chapter 12 Plan, the Debtors proposed to sell their non-exempt real property and retain 200 acres of homestead.

The Debtors proposed to sell the East 145.4475 acres of the South 200 acres of Survey 50, S.P.R.R. Co. Survey, Tom Green County, Texas [Lange tract]. This property was acquired by the Debtors on December 1, 1960, and the Debtors had used it for farming purposes since that time. The Debtors acquired the West 54.5525 acres of the South 200 acres of Survey 50 at the same time they acquired the Lange tract, and both tracts were farmed as a unit. This 54.5525 acres is a part of the Debtors' homestead, along with an undivided 64.5% interest in the West 225.5 acres of the North 451 acres of Survey 50, S.P.R.R. Co. Survey, Tom Green County, Texas. The Debtors reside on the 54.5525 acre tract, and all of the homestead is farmed, except for the location of their home, etc.

Attached is a copy of the map used in the Bankruptcy Court to show the location of the different tracts, and also to show the location of the access to Survey 50 and specifically to the Lange tract.

A paved public road runs along the West boundary of the entire length of the section, eventually linking with U.S. Highway 87, but the paved road does not reach or provide access to the Lange tract.

An unpaved public road (the Krupela Road) runs along the eastern boundary of Survey 50 to approximately 1/2 mile from the Lange tract. The Debtors claim that there is a prescriptive easement in favor of the public running from the 1/2 mile point on the East line of Survey 50 approximately 800 feet to the Northeast corner of the Lange tract, and continuing South along the East line of the Lange tract approximately 1,800 feet to the Southeast corner of the tract. There was no indication or evidence regarding what lies directly to the South of the Lange tract.

Norman Dierschke owns the property immediately to the North of the Lange tract and to the west of Krupela Road. The unpaved public road borders Norman's land and the alleged 1/2 mile prescriptive easement allegedly crosses Norman's land. A letter from attorney Terry Sterling was introduced into evidence indicating that there exists a Right of Way Deed for a road along the West side of the Northwest Quarter of Survey 49 (located Northeast of the Lange property); however, the right of way does not extend to the Lange property. The right of way is the Krupela Road.

Neither Norman Dierschke nor the owners adjacent to the Krupela Road were parties to the bankruptcy proceedings and none of these folks participated in the hearing.

Without the Krupela Road and the alleged 1/2 mile prescriptive easement the Lange Tract is landlocked.

The easement by necessity ordered by the Bankruptcy Court is 30 feet wide and is approximately 1,750 feet long and runs across the Debtors' homestead.

The Bankruptcy Court found that the Debtors failed to establish a prescriptive easement because the necessary parties (i.e. the owners and the adjacent owners) were not before the Court. The Court found that there was insufficient evidence to prove a prescriptive easement, which, if found, would have granted access to the Lange tract without the need for the easement by necessity across the homestead property of the Debtors.

Debtors argue that the Bankruptcy Court erred in ordering them to grant an easement by necessity because there existed access to Lange's property by way of a prescriptive easement.

A prescriptive easement is acquired by "a use that is open and notorious, or with knowledge and acquiescence on the part of the owners of the servient tenement, and that is adverse, exclusive, uninterrupted, and continuous for the requisite period of time. The right rests on an adverse, continuous, and uninterrupted use, which will raise a presumption that the owner of the land granted the easement, and that the grant has been lost." 31 Tex. Jur. 3d Easements & Lic. in Real Property, Section 33.

"To obtain a prescriptive easement one must use someone else's land in a manner that is open, notorious, continuous, exclusive, and adverse for the requisite period of time." *Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979).

If the landowner and the party claiming the prescriptive easement both use the same way, "the use by the

claimant is not exclusive of the owner's use and therefore will not be considered adverse." *Id. See also Vrazel v. Skrabanek*, 725 S.W.2d 709 (Tex. 1987).

In order to establish an easement by necessity, the following elements must be proven:

> "(1) a unity of ownership of the dominant and servient estates prior to their severance;
>
> "(2) access to the landlocked tract must be based on necessity and not convenience; and
>
> "(3) the necessity for access must exist at the time the dominant and servient estates are severed."

Jordan v. Rash, 745 S.W.2d 549, 553 (Tex. App. – Waco 1988, no writ), citing *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984).

The facts before the Bankruptcy Court came through the testimony of Debtor, Marvin Dierschke. He testified that:

> (1) the Krupela Road was opened because a man was once landlocked;
>
> (2) the Krupela Road (public road) does not extend all the way to the Lange Tract (sic);
>
> (3) Marvin Dierschke has used the Krupela Road and the alleged prescriptive easement for years;
>
> (4) there was no other access to the Lange Tract (sic) – except for the alleged prescriptive easement or an easement across Dierschke's homestead;
>
> (5) that if the Court did not find a prescriptive easement, the Lange Tract would be landlocked;

(6) "anyone that had any business passed through it" (sic)

(7) back in the early 40s (sic) during World War II the Van Court Auxiliary Field used the alleged prescriptive easement;

(8) the owner of the property on which the alleged prescriptive easement exists is the brother of Marvin Dierschke;

(9) Marvin Dierschke had used the alleged prescriptive easement for almost 30 years;

(10) the people on the other side of the tract used that land;

(11) anybody could use it;

(12) he never asked his brother for permission to use it;

(13) it has never been closed;

(14) anybody that wants to drive down there can drive down there;

(15) the property on the east side is owned by an estate and there is a whole bunch of little tracts;

(16) none of the other people were there to testify (including his brother, Norman).

As to the easement issue, the Bankruptcy Court found at the close of the hearing:

> There is no question by what the requirements of an easement of necessity have been met. There was first a unity of ownership. The title to the property is still in Mr. Marvin Dierschke, subject to the Court's control.
>
> Second, the need exists at the time of the transfer. We are now getting ready to transfer the property. The need for the easement exists now.

> And, third, it must be in the terms of some cases an absolute necessity that clearly exists here. We have some testimony that there may be a prescriptive easement, but this Court cannot establish a prescriptive easement, or even assume that one exists, when the parties offer (sic) whose property that alleged easement runs, are not even parties to this proceeding. They were not Noticed (sic); they were not made parties.
>
> I certainly can't say that there is an easement offer (sic) their land until they have had a chance to have their say. It may well be that they have granted to Mr. Dierschke some right to go across their land. And that is fine. But that does not mean that a right is transferrable; nor does it do away with the necessity of an easement of necessity.

It could be assumed that when Dierschke testified that "anyone" could and did use the alleged prescriptive easement, this would include his brother, Marvin, (sic) as it was on his land. According to the cases, if his brother used the alleged easement, the elements of the prescriptive easement are not met.

The Debtors also argue that by granting an easement by necessity across their land, this is an unconstitutional taking of their property. No authority has been cited for this argument.

"An easement does not convey property itself." *Lakeside Launches v. Austin Yacht Club*, 750 S.W.2d 868, 871 (Tex. App. – Austin, 1988, writ denied), so there has been no taking of Debtors' property.

The factual findings of the Bankruptcy Court are subject to review in accordance with the clearly erroneous

standard. *mater (sic) of Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986).

Upon such review, a factual finding is not determined to be clearly erroneous unless, although there is evidence to support such finding, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Yaquino v. Greer*, 81 Bankr. 870, 877 (N.D. Tex. 1988) ["if the trier of fact's account of the evidence is plausible in light of the record viewed in its entirety, an appellate court may not reverse it." (citing *Anderson v. Bessemer City*, 740 U.S. 564, 573 (1985)].

The question of necessity is one of mixed law and fact, and therefore normally for the fact finder. *Mitchell v. Castellaw*, 246 S.W.2d 163, 168 (Tex. 1952).

The Court finds that the Bankruptcy Court did not abuse its discretion in reaching its decision to order an easement by necessity across Debtors' homestead; and that there is sufficient support in the record to affirm the "Order Granting Trustee's Motion to Compel Debtors to Grant an Easement by Necessity."

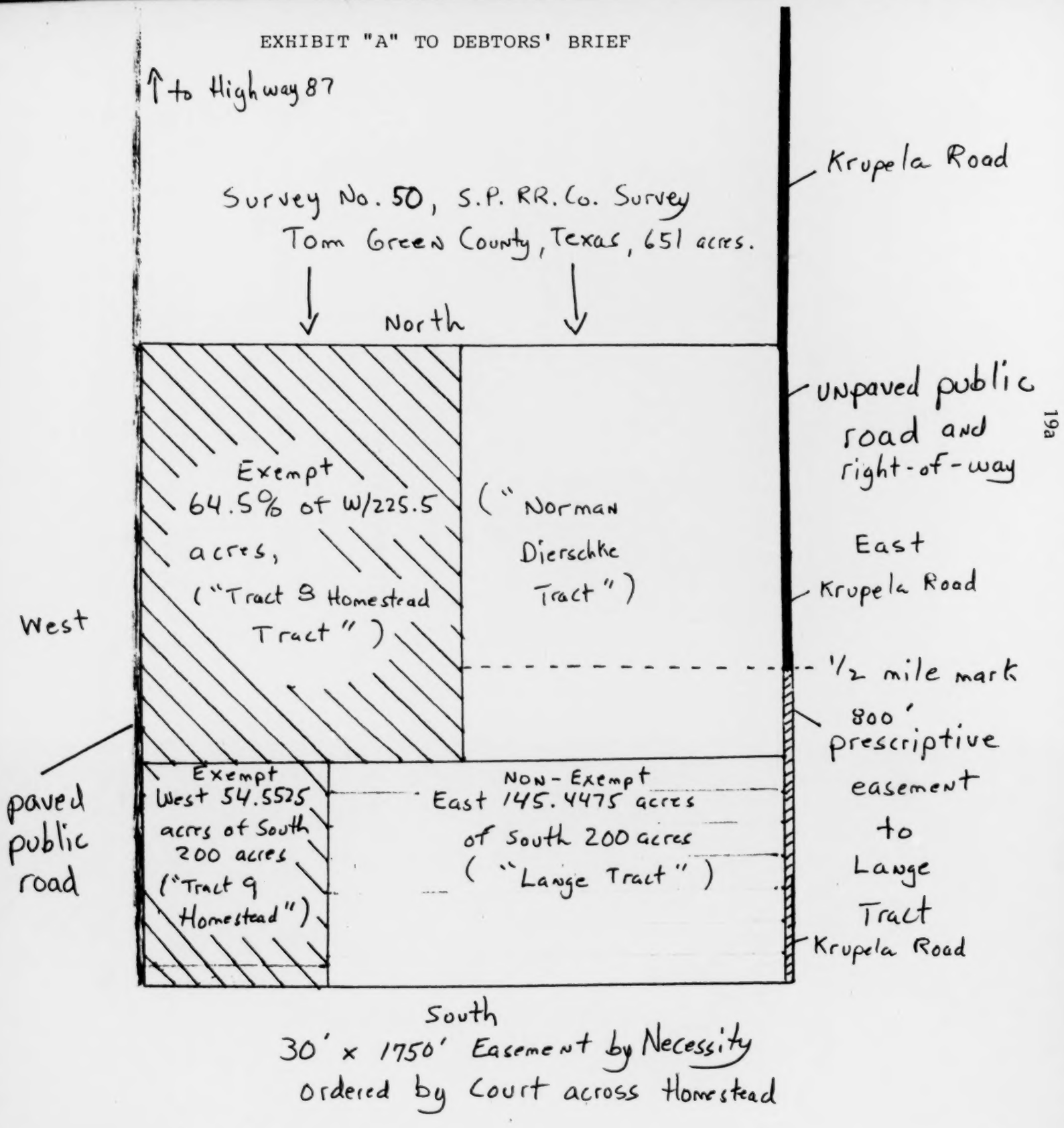
It is therefore **ORDERED** that the "Order Granting Trustee's Motion to Compel Debtors to Grant an Easement by Necessity" is hereby **affirmed**.

The Clerk shall furnish a copy hereof to each attorney of record and to the Bankruptcy Court.

Dated July 30, 1990.

/S/ Halbert O. Woodward
HALBERT O. WOODWARD
Senior United States District Judge

EXHIBIT "A" TO DEBTORS' BRIEF



- Homestead
- Non-Exempt Tract Sold to Lange
- Court Ordered Easement By Necessity
- Prescriptive Easement

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1711
Summary Calendar

IN THE MATTER OF: MARVIN A. DIERSCHKE and JANIS L. DIERSCHKE, Debtors.

MARVIN and JANIS DIERSCHKE,

Appellant,

versus

WALTER O'CHESKEY, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern Northern (sic) District of Texas
CA 6 90 0027 W

(February 19, 1991)

Before CLARK, Chief Judge, SMITH and WEINER, Circuit Judges.

PER CURIAM:*

Marvin and Janis Dierschke appeal the order of the district court affirming the decision of the bankruptcy

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

court to grant an easement by necessity over their exempted property. The district court correctly found that no prescriptive easement existed. The record contains no proof of a continuous, uninterrupted adverse use of the purported prescriptive easement. The court thus correctly established an easement of necessity over the Dierschke's (sic) exempted property. Furthermore, because an easement entails only a use of the servient estate and not a conveyance of the estate itself, the district court properly ruled that no forced sale occurred to violate the protections afforded by Texas' homestead law.

The judgment appealed from is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1711

IN THE MATTER OF: MARVIN A. DIERSCHKE and JANIS L. DIERSCHKE, Debtors.

MARVIN and JANIS DIERSCHKE,

Appellant,

versus

WALTER O'CHESKEY, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(March 18, 1991)

Before CLARK, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ Charles Clark
CHIEF JUDGE

THE BANKRUPTCY COURT'S ORAL JUDGMENT ANNOUNCED MARCH 1, 1990

The Court has reviewed the documents offered as Exhibits testimony and has reviewed the plan of reorganization.

On October 26th, 1989, the debtors filed what was termed the Fifth Amended Plan. And that plan was confirmed by an order dated the same date because it was (sic) result from some substantial negotiations. The Fifth Amended Plan Well (sic), put it this way: The order referred to in Exhibit B which meant the Exhibit B to the plan. Exhibit B to the plan was entitled, "Debtor's (sic) Method of Plan Execution and Treatment of Creditor's Claim. (sic)

So even though it resulted from negotiations, this is the debtor's (sic) proposal. As indicated, it was incorporated in the order confirming the plan which was signed by the attorneys for the debtor (sic), by the trustee, by the attorney for Central National Bank, and by the attorney for Stotler and Company.

There were some stipulations to the confirmation of the plan which the Court made at the time of confirmation. The Court notes that paragraph, (sic) one capital, (sic) A of the debtor's (sic) method provides that through the chapter 12 Trustee, the debtors will sell the non-exempt property that was designed elsewhere and includes the real estate we have been talking about here today.

They were to sell it by February 3rd, 1990 (sic) and what was referred to as the closing date. And a bit further

on in paragraph 7, capital A, the sale price was specified to be greater than $218,500.00 or the actual sale price. In effect, the $218,500.00 was a floor.

In paragraph one, capital B, Mr. Brian Dierschke was given an exclusive right to buy before the closing date, apparently, (sic) the same price. And it says if a sale has not been closed before the closing date, Brian Dierschke will have a non-exclusive right to purchase for cash such property at any time prior to its conveyance to a third party or the new holders (sic) including foreclosure.

In paragraph 7C, we refer to the provisions granting a power of attorney, irrevocable to the Trustee, to convey the property; also, spelling out that the Trustee could informally market it prior to January 3, 1990 (sic) which (sic) active market it publicly after that date.

And in that respective provision of (sic) the property is not sold the lien which was placed on the property for benefit of the unsecured creditors could be foreclosed in the first Tuesday of March 1990, which is rapidly approaching.

In reviewing all of these items together, the Court comes to the conclusion that Mr. Brian Dierschke has exclusive right until February 3, 1990, very specific; but after that, he becomes simply another purchaser. And he could deal with the Trustee as anyone else might.

We do not find that he is given a first right of refusal. He is simply indicated to be another prospective purchaser.

The Trustee, on February 14th, 1990 (sic) filed a motion to sell the property free and clear of liens, and a motion to grant an easement by necessity.

This, of course, is the contract, or the Trustee's application, with respect to the contract which we were talking about today, wherein Mr. David (sic) sought to buy the property from the Trustee for a total price of $272,552.70. It does call for the Trustee to pay the real estate commission, the survey, and title policy are to be paid for by the buyer.

On February 22, 1990 (sic) Mr. and Mrs. Dierschke filed, on behalf of Brian Dierschke, and offered to purchase the property for $255,823.54; that is, to purchase the real property which, of course, is the amount offered by Mr. Lange with the real estate commission. The parties have argued that this is an amount equal to what Mr. Lange offered. They, somehow, feel like they have a right to match that offer.

The Court doesn't feel so. Mr. Dierschke had his right up to February the 3rd, specifically, given him in the contract. If he chose not to exercise that right, then he has to suffer the consequences for failure to exercise that right. I don't know why he didn't. Maybe he thought he could buy it cheaper later on. I don't know. But, in any event, he didn't do so, and he must now deal as any other purchaser might deal.

But even if there was a first right of refusal, it was not met. The offer by Mr. Dierschke does not meet the offer made by Mr. Lange. I refer you to paragraph 6 of his motion which says the debtors further seek authority to deduct from the gross sale proceeds all reasonable and

necessary costs of sale including fees and expenses of attorneys, duly employed professionals, closing costs, advalorem (sic) taxes. And it could be argued that some of those are included in the Lange contract, at least, (sic) by implication. Although, if you read just this, it would include the title insurance fees.

I do note, however, in the contract, they have said that Mr. Dierschke would pay those. But it goes on. And any taxes due to the Internal Revenue Services as a result of this sale. That is an income tax provision that is not involved in Mr. Lange's proposal, and it does not comport with the plan, because the plan says the net proceeds of the sale of this property and defining that proceeds, it only deducts expenses of sales. It doesn't say a thing about moneys due to the Internal Revenue Service. So if there are any loans to the Internal Revenue Service and some reference to that today, Mr. Dierschke is going to have to pay those. Mr. and Mrs. Marvin Dierschke, because under the plan the only deductions are the expenses of sale.

The Court, therefore, concludes that the Notice of this hearing is adequate; that there was no first right of refusal; that the Trustee is certainly morally, if not legally and I kind of believe under the circumstances, legally, obligated to close the first contract he has accepted.

For the reasons stated, this Court feels that the offer made by Brian Dierschke did not match the offer proposes. We tried – There were some attempt (sic) to explain that away that the argument, I find that the same kind of what I consider to be weazling with respect to the contract itself.

Then, of course, the fact that the provisions of the plan were the construing of those that were prepared by the debtor (sic), of which he is responsible. And if there is any ambiguity, then they (sic) are certainly to be construed against the debtor (sic).

It is, also, very interesting to this Court that Brian Dierschke was faced with this problem; did not offer one thin dime to the estate nor to Mr. Lange. If he really wanted this property, then, he should have made an offer – a real offer. There is no benefit to this estate except (sic) Mr. Brian Dierschke (sic) offer even if it did exactly match Mr. Lang's (sic) offer.

Therefore, his, Mr. Brian Dierschke's motion will be denied in all things.

Now, let's turn to the easement. There is no question but what the requirements of an easement of necessity have been met. There was first a unity ownership. The title to this property is still in Mr. Marvin Dierschke, subject to this Court's control.

Second, the need exists at the time of the transfer. We are now getting ready to transfer the property. The need for the easement exists now.

And, third, it must be in the terms of some cases an absolute necessity that clearly exists here. We have some testimony that there may be a prescriptive easement, but this Court cannot establish a prescriptive easement, or even assume that one exists, when the parties offer (sic) whose property that alleged easement runs, are not even parties to this proceeding. They were not Noticed (sic); they were not made parties.

I certainly can't say that there is an easement offer (sic) their land until they have had a chance to have their say. It may well be that they have granted Mr. Dierschke some right to go across their land. And that is fine. But that does not mean that a right is transferrable; nor does it do away with the necessity of an easement of necessity.

Therefore, the easement will also be granted. That easement will be a 30-foot easement for the purpose of ingress and egress by the purchaser, his heirs, and assigns, his tenants, and invitees, and licensees, in any way, manner to, go to or from the property, which we have been discussing hereto today to the paved road running along the western boundary of Section 50 and what we are referring to, apparently, district 11; the easement to run along the southern boundary of the land presently owned by Marvin Dierschke and being adjacent to the southern boundary line of that Section 50.

The Court was presented with proposed orders, and have signed those orers (sic). I will submit those to you at this time. (Indicating)

Mr. O'Cheskey, here is an order granting the easement of necessity, and here is an order to sell free and clear.

MR. O'CHESKEY: Thank you, Your Honor.

THE COURT: I order you to furnish copies to the appropriate parties.

(END OF HEARING)

SCHEDULES B - STATEMENT OF ALL PROPERTY OF DEBTOR

Schedules B•1, B•2 and B•4 must include all property of the debtor as of the date of filing of the petition by or against him.

SCHEDULE B•1 - REAL PROPERTY

Description and location of all real property in which debtor has an interest. Include equitable and future interests, interest in estates, by the entirety, community property, life estates, leaseholds and rights and powers exercisable for his own benefit.	Nature of interest. Specify all deeds and written instruments relating thereto.	Market value of interest without deduction for secured claims listed in Schedule A•2 or exemptions claimed in Schedule B•4.

(See attached appraisal sheet)

Reference	Description	Value
Tom Green County Tract #1	12.20 net acres, which is 20.2 acres and 1/2 interest in 200 acres ($900/ac). This acreage is out of a 355.02 acre tract, less 135 acres.	$120,000
Tom Green County Tracts #2 & #3	13.476 acres ($2,000/ac) 106.845 acres ($2,000/ac)	27,000 192,500
Tom Green County Tract #4	43.787 acres ($2,000/ac), less 5.065 acres for county road (1/2 interest in Marvin Dierschke) Royalty income	41,500 6,000
Tom Green County Tract #5	10 acres ($2,000/ac)	20,000
Tom Green County Tract #7	126.7052 acres, less 1/2 minerals	96,870
Tom Green County Tract #8	145.4475 acre tract - homestead which is a 64.5% interest in Marvin Dierschke in 225.5 acres	281,150
Tom Green County Tract #9	200 acre tract ($900/ac) - Homestead is 54.55 acres	224,700
Concho County Tract #6	206.7 acre tract ($500/ac) (5/6th Marvin Dierschke)	124,000
Oil & Gas Interests Tracts #10, #11, #12, and #13	Survey 124, T & N RR Co., Block 72, Abstract 1188, Concho County	1,000
	TOTAL.....	$1,134,720

EXHIBIT B.1
MARVIN A. DIERSCHKE
SUMMARY OF OWNERSHIP & VALUATION
NOVEMBER 30, 1988

TRACT NO.	NET ACRES	SURVEY	COUNTY	AD VALOREM TAX VALUE	APPRAISAL VALUE	EXPLANATION
1	120.20	67, 68	Tom Green	$108,200	$ 120,000	355.02 gross acres, less 135 acres and less an undivided 1/2 int. in 200 acres. Ad Valorem Tax Value of this tract is $90,000, $900/A. The N. 20.2 A. has an Ad Valorem Tax Value of of $18,200, $901/A.
2	13.476	76	Tom Green	$ 27,000	$ 27,000	Ad Valorem Tax Value $2004/A
3	106.845	76	Tom Green	$233,700	$ 192,500	Ad Valorem Tax Value - Land $213,700, Bldg. $19,800, $2,000/A
4	19.359	E/2 58	Tom Green Royalty (Producing)	$ 38,700	$ 41,500 6,000	Ad Valorem Tax Value $1,999/A - Appraisal Dist. Records show Marvin Dierschke owning entire 38.718 acres because they do not pick up property divisions in divorces.
5	10	93	Tom Green	$ 22,700	$ 20,000	Ad Valorem Tax Value - Land $10,000, Bldg. $12,700, $1,000/A
6	206.7	124	Concho	$103,350	$ 124,000	Ad Valorem Tax Value $500/A
7	126.7052	157	Tom Green & Concho	$ 96,870	$ 96,870	Ad Valorem Tax Value - 112.7423 A. in Tom Green $90,200, $800/A Ad Valorem Value -

EXHIBIT B.1
MARVIN A. DIERSCHKE
SUMMARY OF OWNERSHIP & VALUATION
NOVEMBER 30, 1988

TRACT NO.	NET ACRES	SURVEY	COUNTY	AD VALOREM TAX VALUE	APPRAISAL VALUE	EXPLANATION
						13.3329 A. in Concho $6,670, $500/A
8	145.4475	50	Tom Green	$276,254	$ 281,150	In Agreement Incident to Divorce, Marvin received a 64.5% interest in this 225.5 acres. Ad Valorem tax records show 2 acre homestead valued at - Land $4,000, Bldg. $198,900. Remaining 223.5 acres valued at - Land $201,200, Bldg. $24,200. Homestead of the Debtor.
9	200	50	Tom Green	$224,700	$ 224,700	Ad Valorem Tax Value - Land $180,000, Bldg. $44,700, $900/A
10-13	Royalty Interest	124	Concho Royalty (Non-Producing)		$ 1,000	Value of non-producing minerals at $5/net royalty acre.
	Total				$1,134,720	

SCHEDULE B•4 - PROPERTY CLAIMED AS EXEMPT

Debtor selects the following property as exempt pursuant to ☐ 11 U.S.C. Section 522(d) or ☐ the laws of the state of _____.

Type of Property	Location, description and so far as relevant to the claim of exemption, present use of the property.	Specify statute creating the exemption.	Value claimed exempt.
<u>Rural Homestead</u>			
House, Barns located on home tract - 200 acres located 2 miles south of Wall. 8494 Hawk Avenue San Angelo, TX 76904			$257,613.00
<u>Personal Property</u>			
Household Good, Pictures and Furniture		Section 42.002(1)	2,500.00
Clothing		Section 42.002(3)(C)	1,200.00
Guns		Section 42.002(3)(D)	300.00
1985 Ford Ranger Pick-up		Section 42.002(4)(I)	3,525.00
1986 Oldsmobile 98		Section 42.002(4)(D)	7,000.00
Life Insurance		Section 42.002(7)	2,000.00
Farm Equipment (see attached)		Section 42.002(3)(A)	13,000.00
			29,525.00

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

IN RE:	§	
	§	
MARVIN A. DIERSCHKE AND JANIS L. DIERSCHKE,	§	CASE NO. 689-60047-12
	§	
	§	
DEBTOR	§	

EXHIBIT D.8

DEBTOR'S STATEMENT OF BASIS FOR VALUATION OF ASSETS

DEBTOR NAME: Marvin A. Dierschke DATE: 2/15/89

ASSET DESCRIPTION: 145.4475 acres in Tom Green County - Survey 50

LAND TYPE	ACRES	AD VALOREM TAX VALUE	APPRAISAL VALUE	DEBTOR'S VALUE
Dryland--Tract #8, Tom Green County (See Schedule B.1)	145.4475	See Notes to Analysis	$281,150	$281,150
TOTALS			$281,150	$281,150

LIENHOLDERS	LIEN AMOUNT	SECURED AMOUNT	UNSECURED AMOUNT
Homestead Tract	$ 0	$ 0	$ 0
TOTALS	$ 0	$ 0	$ 0

NOTES TO ANALYSIS

Appraisal by Central National Bank. In Agreement Incident to Divorce, Marvin received a 64.5% interest in this 225.5 acres. Ad Valorem tax records show all of Debtor's interest is his homestead valued at - Land $4,000, Bldg. $198,900. Remaining 223.5 acres valued at - Land $201,200, Bldg. $24,200. Homestead of the Debtor.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

IN RE:	§	
	§	
MARVIN A. DIERSCHKE AND	§	CASE NO. 689-60047-12
JANIS L. DIERSCHKE,	§	
	§	
DEBTOR	§	

EXHIBIT D.9

DEBTOR'S STATEMENT OF BASIS FOR VALUATION OF ASSETS

DEBTOR NAME: Marvin A. Dierschke DATE: 2/15/89

ASSET DESCRIPTION: 200 acres in Tom Green County - Survey 50. 55 acres constitute the homestead of the Debtor.

LAND TYPE	ACRES	AD VALOREM TAX VALUE	APPRAISAL VALUE	DEBTOR'S VALUE
Dryland--Tract #9, Tom Green County (Schedule B.1)	200	$224,700	$224,700	$224,700
TOTALS		$224,700	$224,700	$224,700

LIENHOLDERS	LIEN AMOUNT	SECURED AMOUNT	UNSECURED AMOUNT
None	$ 0	$ 0	$0.00
TOTALS	$ 0	$ 0	$0.00

NOTES TO ANALYSIS

Appraisal by Central National Bank. Ad Valorem Tax Value - Land $180,000, Bldg. $44,700, $900/A. Homestead of Debtor. Unencumbered, non-exempt value = $130,500.00.

(#2)

No. 90-1920

FILED
JUL 11 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

MARVIN DIERSCHKE AND JANIS DIERSCHKE,

Petitioners,

v.

WALTER O'CHESKEY, TRUSTEE, et al.,

Respondent.

Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Fifth Circuit

RESPONDENT WALTER O'CHESKEY, TRUSTEE'S BRIEF IN OPPOSITION

JOHN C. SIMS
SIMS, KIDD, HUBBERT & WILSON
P.O. Box 10236
Lubbock, Texas 79408
(806) 763-9555
FAX (806) 763-5804
Counsel for Respondent Walter O'Cheskey, Trustee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether section 522(c) of the Bankruptcy Code of 1978 prohibits the Bankruptcy Court from requiring debtors to sell or grant real property in the form of an easement, exempt under state homestead laws, to third parties for the benefit of unsecured creditors after the debtor's exemptions have been allowed under § 522(1) of the Bankruptcy Code.

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STATUTE

11 U.S.C. § 522(c) 2, 3

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, WALTER O'CHESKEY, CHAPTER 12 BANKRUPTCY TRUSTEE, ("TRUSTEE"), respectfully filed this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Marvin Dierschke and Janis Dierschke.

INTRODUCTION

This is an appeal of a decision in Bankruptcy Court in granting an easement across debtor's homestead exempt property so that land could be sold to a buyer of non-exempt farm land in accordance with debtor's plan of reorganization.

STATEMENT OF THE CASE

The Trustee in order to sell the property for the benefit of the creditors filed a motion to have an easement for ingress and egress granted across debtor's exempt land. The question of the Court's jurisdiction was not raised. The Trial Court in applying Texas law by judgment granted an easement by necessity finding all the elements required under Texas law.

Appellants raise a constitutional question for the first time in this Writ, in fact not at the District Court or Circuit Court of Appeals level did Appellant raise the question raised to this Court concerning constitutionality.

The fact question argued by Appellant throughout has been whether the Court should have found a prescriptive easement to exist across a third party's land that was not a party to the hearing or bankruptcy proceedings. The Bankruptcy Court and the District Court held that the trial court had no evidence before it for a prescriptive easement.

REASONS FOR DENYING THE WRIT

Applicants for the first time raise the question concerning the Bankruptcy Court's being prohibited under Section 522(c) of the Bankruptcy Code of 1978 from requiring the debtor to sell or grant real property in the form of an easement.

Section 522(c) was not even mentioned in Appellant's Brief to the District Court. In a well reasoned opinion the District Court affirmed the easement finding "The question of necessity is one of mixed law and fact, and therefore normally for the fact finder." *Mitchell v. Castellair,* 246 S.W.2d 163, 168 (Tex. 1952).

"The Court found that the Bankruptcy Court did not abuse its discretion in reaching its decision to order an easement by necessity across Debtor's homestead; and that there was sufficient support in the record to affirm the 'Order Granting Trustee's Motion to Compel Debtors to grant an easement by necessity.' 'An easement does not convey property itself.' *Lakeside Launches v. Austin Yacht Club,* 750 S.W.2d 868, 871 (Tex. App. – Austin, 1988, writ denied), so there has been no taking of Debtors' property." Certainly no exempt property has been liabled with

any debt of the debtors that arose, or that was determined under Section 522 of the Code.

Appellants again failed to raise Section 522(c) of the Bankruptcy Code in their Statement of Issues and Brief on Appeal to the 5th Circuit. The Fifth Circuit Court of Appeals held that "because an easement entails only a use of the servient estate and not a conveyance of the estate itself, the District Court properly ruled that no forced sale occurred to violate the protection offered by Texas homestead law.

The interpretation of Section 522(c) was within the jurisdiction of the Bankruptcy Court therefore jurisdiction as to its application was proper.

Homesteads in Texas have long been subject to easement by necessity. The easement granted does not subject the homestead to claims of creditors but in fact under 522(c) washes the claims of all creditors away.

CONCLUSION

This Court should deny the Writ of Certiorari for the reason that Appellants have failed to demonstrate that any statutory or constitutional right has been denied Debtors.

Respectfully submitted,

JOHN C. SIMS
SIMS, KIDD, HUBBERT & WILSON
P. O. Box 10236
Lubbock, Texas 79408
(806) 763-9555
FAX (806) 763-5804
Counsel for Respondent
Walter O'Cheskey, Trustee

/s/ John C. Sims
JOHN C. SIMS
Texas State Bar. No. 18426000